(3)

No. 94-967

In The

Supreme Court of the United States

October Term, 1994

WILLIAM FIELD AND NORINNE FIELD,

Petitioners,

vs.

PHILIP W. MANS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

JOINT APPENDIX

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Petition For Certiorari Filed November 22, 1994, Certiorari Granted May 1, 1995

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58 pp

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U.S. District Court
U. S. District Court of New Hampshire (Concord)

CIVIL DOCKET FOR CASE #: 93-CV-401

In re: Mans — Filed: 07/23/93
Assigned to: Senior Judge Martin F. Loughlin
Demand: $0,000 — Nature of Suit: 422
Lead Docket: None — Jurisdiction: Federal Question
Dkt # in USBC-NH : is 91-1194
Dkt # in USBC-NH : is 90-12385
Cause: 28:1334 Bankruptcy Appeal

WILLIAM FIELD appellant	David H. Ferber, Esq. [term 08/17/93] [COR LD NTC] Laboe & Beasley PO Box 463 Concord, NH 03302-0463 225-5010
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NORINNE FIELD appellant	David H. Ferber, Esq. [term 08/17/93] (See above) [COR LD NTC]
	Christopher J. Seufert, Esq. (See above) [COR LD NTC]

v.

PHILIP W. MANS
appellee

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Philip W. Mans
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Lebanon, NH 03766

7/23/93	1	BANKRUPTCY RECORD on appeal received (bc) [Entry date 07/26/93]
7/26/93	2	NOTICE of docketing and briefing deadline; Bankruptcy briefing order deadline 9/14/93 (signed by Clerk James R. Starr) (bc)
8/9/93	3	ORDER, deft shall cause counsel to file and appearance by 9/7/93 or notify this court that he wishes to proceed pro se setting Notice of Compliance deadline to 9/7/93 (signed by Magistrate Judge William H. Barry Jr) (kats)
8/10/93	4	Appellant's BRIEF by William Field, Norinne Field. (kats) [Entry date 08/11/93]
8/13/93	5	MOTION by William Field, Norinne Field for David H. Ferber, Esq. to Withdraw as Attorney (pltfs represented by C. Seufert) (prk) [Entry date 08/16/93]
8/17/93	–	ENDORSED ORDER granting [5-1] motion for David H. Ferber, Esq. to

Withdraw as Attorney (Terminated attorney David H. Ferber for Norinne Field, attorney David H. Ferber for William Field (signed by Senior Judge Martin F. Loughlin) (kats)

10/28/93	6	ORDER, deft/appellee, Mans has failed to file an appearance or responsive pleading, per this court's order, by 9/7/93; Accordingly this case is ready for the presiding judge to rule on the appeal on the basis of the record before the court (signed by Magistrate Judge William H. Barry Jr.) (kap) [Entry date 10/29/93] [Edit date 11/30/93]
10/29/93	–	file to MFL for ruling (kap)
11/29/93	7	MOTION by Philip W. Mans for Reconsideration of [6-1] order with memorandum; Objection to Motion Deadline 12/20/93 (kap) [Entry date 11/30/93]
12/7/93	8	ORDER denying [1-1] bankruptcy appeal; the bankruptcy court's ruling is affirmed because reasonable reliance is a required element to find non-dischargeable debt pursuant to 11 USC 523 (a)(2)(A) and because the record supports the finding that the appellants' reliance on the appellee's misrepresentations was not reasonable. (signed by Senior Judge Martin F. Loughlin) (kap) [Entry date 12/09/93]
1/12/94	9	ORDER the court hereby considers Philip W. Mans' letter of 8/26/93 as a pro se appearance and the order of 10/28/93 is abrogated (signed by Senior

		Judge Martin F. Loughlin) (kap) [Entry date 01/13/94]
1/27/94	10	JUDGMENT is hereby entered in accordance with Senior Judge Martin F. Loughlin's order dated December 7, 1993. (Signed by Clerk James R. Starr) (kap)
1/27/94	–	Case closed (kap)
2/7/94	11	MOTION by William Field, Norinne Field for Reconsideration of [10-1] judgment order with memorandum; Objection to Motion Deadline 2/28/94 (kap) [Entry date 02/08/94]
2/15/94	12	OBJECTION by Philip W. Mans to [11-1] motion for Reconsideration of [10-1] judgment order (kap) [Entry date 02/16/94]
3/22/94	13	ORDER denying [11-1] motion for Reconsideration of [10-1] judgment order (signed by Senior Judge Martin F. Loughlin) (kap)
4/13/94	14	NOTICE OF APPEAL by William Field, Norinne Field. Fee Status: -$0- Appeal Record Transmittal Due 4/19/94 File stamped copies to all parties with Appeal Information Sheet; certified copy of docket, entire original case file, appeal information sheet to CCA. (jeb) [Entry date 04/15/94]
4/13/94	15	Addendum by appellant William Field, appellant Norinne Field to [14-1] appeal (jeb) [Entry date 04/15/94]
4/13/94	16	DESIGNATION by William Field, Norinne Field of record on appeal RE: [14-1]

		appeal by Norinne Field, William Field. Entire original record to be forwarded on appeal. (jeb) [Entry date 04/15/94]
4/15/94	–	Appeal record sent to CCA with Clerk's certificate on [14-1] appeal by Norinne Field, William Field – transmitting documents: 1-16 (jeb)
4/15/94	–	Called Attorney Suefert's Office – no filing fee included with notice of appeal. They said it would be mailed out this date to USDC-NH. (jeb)
4/20/94	–	Filing Fee Paid; FILING FEE of $105.00 re PLAINTIFF'S NOTICE OF APPEAL – RECEIPT # 005952. Called CCA on 4/21/94 and advised them. Send Earline at CCA a copy of the receipt. (jeb) [Entry date 04/21/94]
4/26/94	–	USCA Case Number Re: [14-1] appeal by Norinne Field, William Field USCA NUMBER: 94-1391 (kap)
8/31/94	165	OPINION of CCA Re: [14-1] appeal by Norinne Field, William Field (kap) [Entry date 10/05/94]
9/22/94	17	MANDATE OF CCA Re: [14-1] appeal by Norinne Field, William Field. Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed. (jeb)
9/23/94	–	Record on appeal returned from U.S. Court of Appeals: [14-1] appeal by Norinne Field, William Field (jeb)
5/16/95	–	Certiorari was granted on May 1, 1995. U.S. Supreme Court has requested

immediate transmittal of entire district court record to their court. Pursuant to their request, document nos. 1-17 forwarded to Sandy Nelsen, Assistant Clerk-Merits, U.S. Supreme Court, this date. (jeb) [Edit date 05/16/95]

The Judgment, dated 8/29/94 of the United States Court of Appeals for the First Circuit is reproduced at pg. 14 of the Petitioners' Petition for Writ of Certiorari.

The Order, dated 8/29/94, of the United States Court of Appeals for the First Circuit is reproduced at pgs. 15 through 16 of the Petitioners' Petition for Writ of Certiorari.

The Order, dated 3/22/94, of the United States District Court for the District of New Hampshire is reproduced at pgs. 17 through 21 of the Petitioners' Petition for Writ of Certiorari.

The Judgment, dated 1/27/94 of the United States District Court for the District of New Hampshire is reproduced at pg. 22 of the Petitioners' Petition for Writ of Certiorari.

The Order, dated 12/7/93 of the United States District Court for the District of New Hampshire is reproduced at pgs. 23 through 31 of the Petitioners' Petition for Writ of Certiorari.

Final Judgment, dated 5/11/93 of the United States Bankruptcy Court for the District of New Hampshire is reproduced at pg. 32 of the Petitioners' Petition for Writ of Certiorari.

[p. 12] WILLIAM FIELD – Cross/Mans

* * *

A. In the original agreements? Not that I know of.

Q. Did I agree to do all of the other things that you asked: pay your attorney's fees, pay the interest, and make my payments directly to the bank?

A. In the letter, you agreed to pay my attorney fees for the transaction, but you disagreed that you would give me any excess money.

Q. I –

A. – and I assumed the issue was dead when you didn't meet the terms.

Q. I did not agree to give you the $10,000 fee?

A. Say that again, Phil.

Q. I did not agree to pay you a $10,000 additional fee, is that correct?

A. No, you did not; although, I would have incurred additional costs to research your new buyer and everything.

Q. Was that information transmitted to you by my attorney by letter of October 27th?

A. That you would not go forward with the transaction, yes.

Q. Did you have a conversation with a business associate of yours by the name of Sal?

A. Sal Lucido.

Q. Yes.

A. Yes. He was my boss.

Q. Did you say – did he tell you that he was on your [p. 13] property and he met Mr. De Felice there?

A. Yes, he did.

Q. Did he tell you that Mr. De Felice told you that he owned the property? He was the owner of the property.

A. Yes, he did.

Q. What was the time period of that, Mr. Field?

A. Mr. Lucido is my boss. He said he was up on the property with a new person he was training and he met someone there and they said that they were the new owner, this Mr. De Felice. I said that is crazy, he couldn't sell it without my permission, and I left it go at that. I think I spoke with you, if you want me to volunteer any other things. Maybe a month later or so when you were late on a payment and you said, "Don't worry about it. It's just something we're doing, and he's helping me on the property."

Q. Was this time period –

A. And I left it go at that.

Q. – in 19– late 1987, early 1988?

A. I'm not sure of the date of that conversation with Sal. It would have been I think in '88 sometime when he was training one of the new men up in that territory that I moved out of.

Q. So you did in 1988 know that the property had been transferred?

A. Absolutely not. As I'll repeat to you, my answer. My [p. 14] boss told me that someone said he was the owner. I didn't believe it was possible because I had paper from you, Phil, and I called and asked you and you said, "No, don't worry about it. I'm just handling it some other way." And I left it go that you got so many businesses, Phil, I don't who – partners you're taking for what –

Q. Did I –

A. – or what involvement DeFelice might have in it.

THE COURT: Excuse me a moment. Excuse me a moment. It was changed, was it?

THE CLERK: It was changed on the notice and Dory never changed it.

THE COURT: All right. We will interrupt this a moment. There was a scheduling mix up. The cash collateral that was scheduled at four o'clock was actually rescheduled to the 9:30. The people want to continue that. Is that correct?

(Off the record. Back on the record)

BY MR. MANS:

Q. Mr. Field, didn't the letter of October 9th, 1987, to your lawyer –

THE COURT: Just a moment.

MR. MANS: I'm sorry, Your Honor. (Pause).

THE COURT: Okay. Back on Mans. Back on that.

MR. MANS: Thank you, Your Honor.

THE COURT: Proceed.

* * *

[p. 20] know that they had done something different, then it would keep me pacified not looking further.

Q. Yes. But that's totally irrelevant to me because when make them.

A. I appreciated that, sir, every month.

Q. What other reasons they might have is pure speculation.

A. That's exactly true, sir.

THE COURT: Proceed.

BY MR. MANS:

Q. Mr. Field, did you not state in your deposition that you spoke with Mr. Bennett at Mascoma Savings Bank on at least two occasions in 1987 and 1988?

A. I spoke with Mr. Bennett after we tried to get some kind of an agreement with you in reference to a direct transfer so that we wouldn't be calling for late payments, and I spoke with Mr. Bennett after Mr. Lucido mentioned this other person that said they were the owner, and he comforted me.

THE CLERK: How are you spelling Lucido.

THE WITNESS: L-U-C-I-D-O.

THE CLERK: Thank you.

BY THE WITNESS:

A. And I asked him if he knew of anything because we're out of the area, and he said he knew absolutely of no changes whatsoever, so I again let it go down the drain. I just [p. 21] figured it was rumor.

Q. Wasn't this, in fact, after – wasn't this, in fact after the transfer and you discussed Mr. De Felice and Crescent Beach Development with Mr. Bennett at the bank?

A. After what transfer?

Q. After the transfer that you alleged that you did not know of.

A. I didn't know of any transfer, sir. It was after Mr. Lucido told me that there was someone there that said he was an owner. It was after that I asked, yes.

Q. Didn't you also say in your deposition that you had talked to Mr. De Felice and his attorney during this period of time?

A. No, sir. Not whatsoever. None whatsoever. None.

Q. After I had filed bankruptcy in December of 1990 personally –

A. Okay.

Q. – and this – the corporation that held the stock that you sold me for the Crescent Beach property was anticipating filing bankruptcy, did I not tell you that I would try to work with Mr. De Felice to try and get him

to buy out my interest so that you would – so you would get some money from him?

A. Yes.

Q. Okay. Did – in fact, you said in your deposition, "I had a conversation with Mr. Mans in 1991 or 1992 on how I [p. 22] could get cleaned out and De Felice could still hold onto the property." Does that sound correct to you?

A. That they were going to pay me off, yes.

Q. And you said that Mans was trying to get me some money out of De Felice?

A. Nance said he was working with you. I don't know what arrangement you two fellows had, but to my knowledge, Phil, you were working with him to pay me off.

Q. At the same time that you were discussing the same sort of payoff with him?

A. Yes. I was accepting – going to accept money at that point. This in '91.

Q. Did he not, in fact, offer you $125,000 for your interest of the note that was worth approximately $145,000 at that point?

A. Yes, sir. He offered a hundred and twenty-five and then he called from his attorney's office and said the attorney decided not to do it.

Q. Is it fair to say that the reason that he did not finally go through with it is he started at 110 – $100,000, and 110, and he just felt it would never stop and –

MR. SEUFERT: Objection. I'm not sure that my client knows what some other third party might have said or thought.

MR. MANS: Your Honor, he had – he was mean with [p. 23] him on an ongoing basis.

THE COURT: You can't refer to what the – somebody else may say they did or didn't do. You can ask this fellow whether he was offered different amounts and whether it was negotiated.

BY MR. MANS:

Q. Were you offered different amounts? Were you offered $100,000? $110,000? $125,000 from Mr. De Felice in an ongoing negotiation process?

A. On the phone, yes.

Q. Okay.

BY THE COURT:

Q. Did you accept the 125,000?

A. Yes sir. I had agreed to accept and release the interest I had in that at that time, yes, sir, at 125,000, and then the next morning, Mr. De Felice backed off of it and said his lawyer told him not to do it, that he was involved with Mr. Mans on other things. I don't know what happened, but it fell through, sir.

BY MR. MANS:

Q. Did I not encourage you to take his offers?

A. Yes, Phil. But again he backed off from making that offer.

Q. Be backed off from the $125,000 offer?

A. He made no counter offer after that agreement. His

* * *

W. FIELD – Direct Testimony To The Court

[p. 26] Q. It wasn't being developed or it was being developed?

A. It was being destroyed, but I thought it was in its process of being developed, and it would never get there. At one or two times, I would speak to Mr. Mans. He said he was being held up by different processes, but his intentions were going forward.

Q. Did you ever see Mr. De Felice at the property when you went there?

A. No, sir.

Q. Was there anybody there when you went there?

A. No, sir. We could just see it from the outside and we never went inside the building, sir. I didn't think that was my prerogative.

Q. Did you ever talk to Mr. Mans about what's going on, is anything happening?

A. Yes. He showed me some beautiful pictures on blueprints and designs. This was, oh, two years into this, I would say, that he had planned to put a boardwalk down and make it a Victorian hotel and do all of the things that we had dreamed all the years we owned it and we didn't have the money to do it, so though it was in a mess, I thought that was getting worse before it gets

better. I had no idea of the other things that were happening at that time.

Q. Now sometime in 1988, your boss told you that he had seen Mr. De Felice there?

[p. 27] A. Yes.

Q. And that De Felice said he was the new owner?

A. De Felice was on our beach and there was trucks or so there.

Q. Did De Felice refer to himself as the new owner?

A. Yes. "I'm one of the new owners," or so he said. But, Your Honor, he has a number of businesses, and one of the times is I took in partners and I didn't know that he would physically sell my property. I thought it – he had two or three properties all around there that he had purchased, and if he had taken on somebody for more money to add more area for the community or what have you, I wouldn't know what he was doing. But when I spoke with Mr. Mans, I had no indication from him that he had sold my property and transferred that. Whether he took on another partner with Sequoia (phonetic) or some other outfit was not concern. If he's getting money from trailer parks or what was not – whoever his partners were. I never dreamed that he had taken the property that he legally couldn't transfer and transfer it. It just didn't occur to me he would do that, sir.

MR. MANS: Your Honor, would you like to see some of the drawings I showed Mr. Field?

THE COURT: No thanks.

* * *

PHILIP W. MANS – Direct/Seufert

[p. 30] Yes.

Q. As part of the purchase price, you gave him back a promissory note in the amount of $187,500?

A. Yes. I gave him $275,000 in cash and a promissory note of $187,000.

Q. The promissory note was secured by a second mortgage on the property?

A. Yes.

Q. You are aware that those Mortgages had a clause in there that any transfer or retransfer of that property needed the written consent of Mr. Field?

A. Yes.

Q. You're familiar with that clause?

A. Yes.

THE COURT: Is that in evidence?

MR. SEUFERT: Yes, it is, Your Honor. You will look at Exhibits N and O.

BY THE WITNESS:

A. Your Honor, may I step down and get a copy of that from my desk?

THE COURT: Yes. You can have your own copies. What paragraph?

MR. SEUFERT: It will be the last paragraph, I believe, on both exhibits, Your Honor.

THE COURT: This is a typical due-on-sale clause.

[p. 31] It doesn't prevent transfer. It simply provides that if you transfer it without the consent, the debt becomes due.

MR. SEUFERT: That's correct, Your Honor.

THE COURT: But there's nothing to prevent the party from transferring it.

MR. SEUFERT: That's correct, Your Honor.

THE COURT: All right. Go ahead.

BY MR. SEUFERT:

Q. Now when you consummated this transaction in June of 1987, you also gave the Fieldses a personal financial statement, did you not?

A. Yes.

Q. Okay. Sir, do you have a copy of that financial statement that you gave to Mr. Field at the transaction?

A. No, I don't.

MR. SEUFERT: Okay. Your Honor, could we move to – all those exhibits into evidence so that we don't have to go back.

THE COURT: These were premarked and agreed beforehand by both sides.

MR. SEUFERT: Yes, Your Honor.

THE COURT: Both set? All right. They'll all be marked into evidence. Mark them all off.

THE CLERK: Plaintiff's Exhibits 1 through 16 entered as evidence.

* * *

W. FIELD – Direct Testimony To The Court

[p. 49] A. Yes, sir.

Q. Do you understand that?

A. Yes, sir.

Q. Now it's curious to me that with the letters in October, you did absolutely nothing to check the state of the title to see if maybe it was transferred. When your boss tells you that Mr. De Felice is going around claiming to be the owner, it would take about a half hour to check the title to see what – whether it was transferred.

A. But I did not believe that it was transferred.

Q. And you didn't believe that because of these letters?

A. I thought that he refused to do it, and I thought that number one, this was, oh, six months or more later that this De Felice thing even came into that picture, and I thought that maybe he had got involved in the project and bought some other property or put money in to be involved with Mans. I didn't think that he really would transfer the property after being – asking and telling no. Your Honor, I took his money and bought my annuity from the Knights of Columbus myself. I would have taken any surplus money and put it – because I didn't need the money while I was still working with Knight that he was paying me each month. I would take that and invest it, so that when I retired I'd have money. You see

what I'm saying. So had I known that he had broken that contract – not broken the contract, sold the place – I now [p. 50] have the option of getting that money in bulk by foreclosing or something like that, calling the note or whatever they say. I had no knowledge that he had done that. I never suspected he could do it without being notified. I thought I had a registered mortgage and if anything had happened, they'd have to notify me that the property was transferred.

Q. Well, you had an attorney, right? The attorney responded to Mr. Man's letter or his attorney's letter?

A. Yes, sir.

Q. Did you ever discuss with your attorney what could be done?

A. I don't recall discussing it after the letter came back that said he wasn't going to do the deal and meet our agreements. I thought the issue was dead then.

Q. He said he would do the deal. He would meet your – all your requirements except the $10,000 item?

A. Yeah. That he would just pay my lawyer's fee or something.

Q. You did not respond to that letter?

A. No, sir. He wouldn't pay it. I thought it was dead.

Q. That was a counter offer. You made no response to his counter offer?

A. Not to my knowledge, sir, except that we thought that it was –

Q. He said he would do everything you requested. He

* * *

WILLIAM FIELD – Redirect/Seufert

[p. 53] money in equal – in a lump, as you say with that capital. I would have gotten it over the period and preferably that way because it would have lasted the rest of my life as a retirement money rather than just this ten-year block.

Q. Okay.

THE COURT: I have no other questions.

REDIRECT EXAMINATION

BY MR. SEUFERT:

Q. I have one last question, Mr. Field. In '88 when your boss had told you that there was some other gentleman on the property, you testified earlier that you confronted Mr. Mans about that and he denied it?

A. I don't remember that confrontation. If I had said it occurred then it must have. I spoke with Mr. Mans in reference to late payments.

Q. Okay.

A. I spoke with Mr. Mans in reference to the way the building was being completely destroyed type of a thing. He showed me plans that he had of what was being done, so I left it go at that. I don't recall the question again was what?

Q. Did you ask him if, in fact, he had sold the property?

A. No. I don't believe I ever confronted because first, I never really thought that that could happen without my mortgage being released. Perhaps, I was stupid in that –

Q. Okay.

* * *

[p. 67] THE COURT: You sent the letter on October 19th saying that you'd agree to their terms except for the ten thousand?

MR. MANS: Yes, Your Honor.

THE COURT: And then the 19th was the day the deed was actually recorded?

MR. MANS: Yes. We said that we would do that – we'd meet three of the terms, but we wouldn't meet that fee that we didn't feel was reasonable and fair. And we felt that the due on sale clause was at best a breach of contract that he had the option to call the note if he wanted to and he didn't. I continued to make payments for three years after that on time and –

THE COURT: Let's take these one by one. The first element is misrepresentation, and I don't see how you get out of misrepresentation. Those letters would imply to a lawyer, let alone a layman, that you hadn't yet transferred it and you're asking his consent.

MR. MANS: All I can say, Your Honor, is I didn't feel that when I signed the deed – I've signed a lot of deeds ahead of time in a lawyer's office and we put them in a folder and then gone to the closing two or three days later because of time schedules, not being able to get

together, and that the closing actually took place on the 12th and the recording was on the 19th, so I considered that in my mind that the [p. 68] closing actually took place when the deed was recorded on the 19th.

THE COURT: Well, that doesn't get you off the hook anyway because the second letter went out on the 19th.

MR. MANS: Yeah. On the 19th, again, conversations orally saying –

THE COURT: Saying that if you would agree to everything except the ten thousand to get your consent to a conveyance.

MR. MANS: We wouldn't agree to the conveyance, so we were going ahead without their consent on the 19th.

THE COURT: All right. I'm going to find that there was a misrepresentation by you and your attorney in sending letters to Mr. Field that clearly implied that it had not yet been transferred, which I don't see how you could read the letters any other way – I think that a minimum full disclosure would have said, "We have a deal with De Felice. He wants to put some money in this thing; would you consent"? Had you done that, Mr. – well, you did tell him that –

MR. MANS: The letter does say that, Your Honor.

THE COURT: That's right. It says that you would – you have some investor that wanted to put some money in the property, and –

MR. MANS: It said we had a deal with Crescent Beach development.

[p. 69] THE COURT: I don't know that you mentioned De Felice, but you mentioned an investor.

MR. MANS: It says,

"Phil has brought in another substantial investor and formed a development partnership called Crescent Beach development. They will be investing a huge sum of money into the development of the property and thereby further enhance the security for the second mortgage held by Mr. and Mrs. Field." So we –

THE COURT: Well –

MR. MANS: – did tell them.

THE COURT: You may have thought that you wouldn't have any trouble getting the consent, but the fact remains that the letter does not disclose a material fact that was in place at the time and that was that you had already drawn a deed to this fellow.

MR. MANS: I couldn't imagine, Your Honor, that –

THE COURT: And you didn't disclose that because you didn't wanted to trigger the due on sale clause.

MR. MANS: I couldn't imagine that bringing in an investor who was going to invest over $625,000, take half of the responsibility for the $350,000 note and give me $447,500 in cash to develop the property of which we each put in another $50,000 immediately for development

cost, wouldn't [p. 70] enhance the value of the property and improve the Fields' position. The fact that the real estate went down later –

THE COURT: Of course, it would, but if you had disclosed those numbers, the obvious result would be that they would say, aha, you got a lot of cash, we'd rather get cashed out. Why don't you cash us out?

MR. MANS: Because Mr. Field told me all along that wasn't what he wanted. He kept telling me that this was part of a retirement. The fact that the – there was a clause in the agreement saying that it could not be prepaid and that if I prepaid it, I would have to pay all of the prepaid interest and the fact that he told me that he did not want the tax ramifications, he had discussed it with his accountant.

THE COURT: That's not evidence. I'm just dealing with – you did say something to that effect, but he – from the balance of testimony here, I would find that there was no real reason why he'd not want to have the money put into an annuity. That testimony just – you didn't bring that out with him in any detail that I can make findings of. The fact that – anyway on misrepresentation, I will find that that element was established. That is, of course, not the entire case. The rest is whether they relied and whether they relied to their detriment and whether their reliance was reasonable. As far as whether Mr. Field relied, there's no question he did rely. He simply didn't check the title. Whether that was [p. 71] reasonable or not is probably the key issue here. The detriment seems established also unless you have some comment on that. If –

MR. MANS: I would comment –

THE COURT: – if you had told them that it's transferred, at that point he could have cashed himself out. You had the liquid money to do so?

MR. MANS: Not at the time that I filed bankruptcy, Your Honor.

THE COURT: No. I'm talking about October of '87.

MR. MANS: Yes, I did. But he didn't want –

THE COURT: The market was better and the cash was there.

MR. MANS: I did, but he didn't want that. That – I wanted to do a straight deal where I paid the whole thing in cash because I didn't want Mr. Field to be holding a second mortgage. You know, in the protracted negotiations I had with him, I knew that he would be around as he was constantly, be looking in – over my shoulder, and a lot of the things that he said that he wanted done with the property that I – that he imputed to me, when I looked at the property, the property was not of any value as far as the building. We brought architects and engineers in, and they said the building has to be torn down.

MR. SEUFERT: Objection. Your Honor, is this [p. 72] evidence or is this closing because these are facts not in evidence, Your Honor?

THE COURT: Mr. Mans is not a lawyer, and he's in effect testifying. I will exclude from my consideration any additional facts. I know what was testified to, and I'll only rely on that. But in terms of whether Mr.

Field relied, not whether it's reasonable, he – it seems to me there's no contrary evidence here that he relied on these letters as implying that, well, if we didn't agree on the deal, you hadn't transferred the property. And in terms of whether it was reliance to his detriment, again, it seems to me that it clearly was to his detriment because he could have either foreclosed at that point and got it out of a good market or he could have in effect forced you to pay it up out of some monies that came out of the transaction.

MR. MANS: As far as detriment, Your Honor, when I filed bankruptcy in 1990, I met with him and I met with De Felice to try and put together a deal because De Felice wanted the property. I raised that testimony here today, Your Honor, and De Felice would have paid him a hundred or $110,000, but he balked at the $125,000.

THE COURT: Well, that's less than what he was owed, so that's detriment. There's no – this record is crystal clear that he could have been cashed out in October of '87.

MR. MANS: Yes, sir.

[p. 73] THE COURT: That's a dead issue.

MR. MANS: Yes, sir.

THE COURT: The only issue left is whether this reliance was reasonable in the circumstances, and I think that's probably going to decide this case. He says that because of the letters he didn't do what he could have done which was simply check the record, and that you in effect deflected him from doing that by the letters because after the letters, he figured, well, we didn't agree

on anything so you weren't transferring it. What's your response?

MR. MANS: My response was that all of the things that were going on indicated – the letter was very clear. The initial letter that we sent on October 9th, we had an agreement with a partner coming in. We had put together a contract for a development company. He was bringing in a lot of money and that we wanted their doing – their permission under the due on sale clause, but if they didn't – if we didn't get their permission, there were other ways to go, and we were negotiating those other ways, and it was clear to me that we would have agreed to all the items except the $10,000 fee which I thought was unreasonable and unfair, and I had no – absolutely no thought that Mr. Field would not agree to the transfer given all of the benefits that surrounded the property, particularly at that time of the year and the economy when things were booming and that was a valuable piece [p. 74] of property. Even at the foreclosure sale in 1991, the bank got the full amount of their first mortgage in a heartbeat. At that time he could have come in and bid and the buyer probably would have gone a lot higher because the bank got covered first bid.

THE COURT: Well, he could have done that if he could have got financing for a bid at that time. How do you get any real estate financing – when, in 1991? When was this foreclosure sale?

MR. MANS: 1991, Your Honor.

THE COURT: Yeah. Unless you happened to have some ready cash, not too many people were buying

at foreclosure sales except for the FDIC with paper because you couldn't get a loan from the bank.

MR. MANS: The Mascoma Bank was very solvent, and I had – I don't know Mr. Field's personal financial situation, but I know that they were very – very positive on the property, and they gave the buyer who came to auction financing for it, so I would assume that they would have given it to Mr. Field, too. They had also offered it to Mr. De Felice.

THE COURT: All right. Any other comments?

MR. MANS: No, sir.

THE COURT: No response?

MR. SEUFERT: None.

[p. 75] THE COURT: Let's see the rest of those exhibits. I don't –

THE CLERK: Do you want them all?

THE COURT: Pardon me?

THE CLERK: Do you want them all?

THE COURT: Yes, all of them. Okay. We'll take a recess until twelve and then we'll announce the ruling, about 15 minutes. (Off the record at 11:47. Session resumed at 12:08)

THE COURT: The Court has before it for trial the matter of Field v. Mans, in *In re: Mans*, case number 90-2385, adversary 91-194. This matter has been tried this morning with testimony and documents with regard to a 523(a)(2)(a) charge that the debt owing to the plaintiffs is

nondischargeable as having been obtained by fraud and false pretenses. Actually, the way the evidence has come down is in terms of obtaining an extension of that credit by fraud or false pretenses at a time when the plaintiffs' allege that they were misled into not pursuing their rights under a due on sale clause by misrepresentations given the – given to them by the defendant implying at least that no transfer had occurred.

To back up a moment, the transaction in question was commenced by an agreement for sale of Mascoma Lodge property on Mascoma Lake near Enfield, New Hampshire, in 1986 which was consummated by a closing and documentation in June of 1997, [p. 76] whereby a promissory note and second mortgage was granted by the buyer to the seller, the plaintiffs here, for a balance of approximately $187,000 of the purchase price. They were paid $275,000 in cash at that time. The mortgage deed – actually there were two deeds, but it's immaterial that there were, in fact, two for – one from Sequoia and one then from Mascoma Lodge Enterprises, Inc., both controlled by Mr. Mans. Each of these documents has a – what is commonly referred to as a due on sale clause which provides that the mortgagor, that is the defendant here, covenants and agrees that it will not convey an interest in or title to the property mortgage without prior written consent of the mortgagee, and if they should so convey without consent of the mortgagee, quote:

> "The whole of the unpaid balance of the indebtedness on this mortgage and the promissory note secured here by me at the option of the holder of this mortgage become immediately

due and payable without further notice," unquote.

The record establishes that on October 8th, 1987, the defendant here caused Mascoma Lake Lodge Enterprises, the then title holder, to transfer the property to Crescent Beach Development, a New Hampshire general partnership. The deed was executed on that date, but was not recorded until October 19, 1987.

On October 9, 1987, the defendant through his [p. 77] attorney corresponded with the attorney for the Fields indicating that the defendant was proceeding with the development of the Mascoma Lake property and that the debtor had brought in a substantial investor and formed a development partnership called Crescent Beach Development whereby the investor would be investing, quote, "A huge amount of money in the development of the property," unquote, which would further enhance the security for the second mortgage held by Mr. and Mrs. Field.

The October 9th letter states that obviously the defendant here did not want to trigger the due on sale clause by reason of the transfer into the development partnership and asked that Mr. and Mrs. Field, as holders of the second mortgage, consent in writing to the transfer of the property to Crescent Beach Development. As indicated above, the deed to Crescent Beach had already been executed on October 8th but had not yet been recorded.

The letter refers to the fact that the defendant could have avoided the due on sale clause by putting the stock

of the corporation into the partnership rather than conveying title to the underlying real property but for various reasons it was preferable to convey the property. As the evidence has established, that was preferable because the new investor, a Mr. De Felice, required that the property be conveyed into the new partnership. He did not want to take the corporate stock [p. 78] of the title holder with the possibility of exposure for unpaid debts by that corporation.

The October 9th letter was answered by a letter dated October 19, 1997 – 1987 from the attorney for the Fields. It indicated the Fields would consent to the transfer upon receiving payment of $250 in lost interest due from the previous closing of this transaction; on condition that Philip Mans make all future mortgage payments by direct bank transfer; on condition that the Mans pay the Fields attorney's fees of approximately $250 to negotiate this consent; and quote, "A one time fee payable upon transfer of $10,000," unquote. The evidence before me indicates that there was no basis for the demand for the $10,000 other than as a condition that the Fields felt they could impose with some economic leverage since Mans was in a process of bringing a new investor in, in which he would have some additional funds into the project and apparently the Fields believed that they could extract another $10,000 even though the purchase price of the property had been negotiated previously in the prior June of the same year. Mr. Field testified that that money was necessary to investigate the new buyer, but I don't find that evidence has any weight since it's apparent to me that had the Fields been given their $10,000, they would

have consented to this transfer without any further investigation.

As indicated above, the deed was actually recorded [p. 79] on October 19, 1987, the date of this letter back from the Fields.

On October 27, 1987, the defendant through his attorney responded to the October 19th letter and indicated that the defendant would be willing to make all the payments requested in the October 19th letter and would be agreeable to having the mortgage payments made by direct transfer, but, quote, "However, the fee of $10,000 is out of the question," unquote.

There is no further correspondence between these parties in this record until February 6th of 1991 which was after the bankruptcy filing of – (Pause). Filing date of December 10, 1990. On that date –

On February 6th, 1991, the Fields' attorney wrote to them indicating that he did some research in the Grafton County Registry of Deeds and found various things including the fact that the Mans did – quote, "Mans did convey the property to Crescent Beach Development. This would trigger the first and second mortgages to the point that the entire amount can be called forward at present," closed quote.

The testimony before this Court establishes in my judgment that the letters from the defendant to the plaintiff in October of 1987 did contain an implicit misrepresentation, i.e., that the property had not yet been transferred and that it would be transferred upon the consent of the Fields in [p. 80] accordance with the

request of the – Mr. Mans. The letters, in my judgment, do imply that no transfer had yet occurred and that would be the normal reaction of any party receiving that letter, whether an attorney or otherwise. The letters do no [sic] imply or that the debtor would not transfer without the consent if he wished to face the due on sale trigger clause. I don't find that the misrepresentation – that it was represented impliedly, that if they couldn't [sic] a deal for the consent that Mans would not – nevertheless, transfer the property and face the due on sale trigger if the Fields agreed – elected to assert that. In other words, the representation that's implicit in those letters is that we haven't yet transferred the property and we need your – want your consent to do so. When the request for consent fell through by – because of the $10,000 demand by the Fields, it's an open question as to whether there was any continuing representation by the debtor that he would not transfer the property.

The evidence clearly establishes that the Fields relied on the implicit representation in these letters that the property had not yet been transferred. It's also established that they relied on this representation and their belief that it had not been transferred and would not be transferred to their detriment in that – at the time of October 1987, the real estate market was still booming in this state and they could have extracted their balance of 187,000, [p. 81] approximately, out of either a foreclosure or forcing Mans to pay out of the funds that he was getting invested in the property or otherwise. As it turned out, the real estate market in the late '80s went into a profound slump and the market values that existed

then were dissipated to the point where when the property was finally foreclosed in 1991, the first mortgagee, in effect, wiped the Fields' position. But to the extent that the reliance and detriment elements are required here, it's obvious to me that they in their own minds did rely on these representations subjectively and didn't do anything further and that in effect they extended the credit to Mr. Mans for another few years, whereby – whereas they could have called the due on sale clause as of October 1987 at the latest when the deed was recorded.

The issue then boils down to the question of reasonable reliance. It is not sufficient in this – under this statute in the Bankruptcy Code to show a misrepresentation and reliance to detriment, but the reliance must be shown to be reasonable in the circumstances.

In that regard, the evidence is that in 1988 – or first that the Fields – at least Mr. Fields visited the property on numerous occasions to see whether – and what kind of development Mr. Mans was doing, and that on one occasion his boss told him that he – the boss had been on the property and had seen a Mr. De Felice who had stated that, quote, "I am [p. 82] the new owner," unquote. The evidence also indicates that Mr. Field discussed this with the banker that held the first mortgage on the property and didn't get any information but demonstrates that he knew that De Felice was claiming to be the owner on the property. Mr. Field apparently in his own mind believed that the property could not have been transferred without his consent which of course as a matter of law is not true. It clearly could be transferred without his consent, but the only result would be to trigger the due on sale clause. There is some conflicting testimony in this record that Mr.

Field did not want prepayment because he was looking for these payments to be part of his retirement. However, there's also testimony that he could have solved that problem by simply putting them into an annuity fund that he had if [sic] had called the loan and got the cash. On balance, I don't believe that it's been established that Mr. Field did not want prepayment in relevant time context of October 1987.

The evidence before me is uncontroverted that Mr. Field was around quite a bit looking at the drawings and the project and talking with Mans as to the progress in developing the property and was accepting mortgage payments for some forty-two months which were paid on currently throughout this transaction until a month or so before Mr. Mans filed his – the month before he filed his bankruptcy case in December 1990. There is also evidence that following the bankruptcy [p. 83] Mr. Field was negotiating with De Felice for a payoff of the second mortgage and had negotiated the number up to $125,000 when the mortgage debt was approximately 150,000, and in fact had accepted that amount from De Felice, but then De Felice backed out of that offer to pay it – obtain that debt at a discounted amount.

Considering all of the foregoing facts, what appears to me most relevant on the reasonable reliance requirement is that the – there's no statement in the letters that could be read as saying we will never transfer the property without your consent. What there was in those letters was a request to transfer – a request to get consent to transfer the property to avoid the due on sale clause. That series of letters and correspondence broke down basically

because of the $10,000 demand by the Fields as a condition for their consent. That left the situation unstructured. In effect, as I said, above – I don't think those letters can be read to imply that Mans would not elect to transfer without the consent and face the due on sale clause if the Fields elected to assert it. Mans in his own mind apparently believed they wouldn't assert it because they wanted a stream of a payments. Whether he was correct or not, he had that option and could have run that risk. Likewise, the Fields, when the situation broke down, had an easy way to determine what Mans was or wasn't doing by simply doing one of two things. They could have number one, [p. 84] asked him what the deal was De Felice who was there, obviously, on the premises acting like an owner. Field never did that over three-and-a-half years of accepting mortgage payments and looking at drawings and discussing the project with Mans. Number two, they could have simply checked the title in the Grafton town – the County Registry of Deeds which Mr. Field has demonstrated he knows very well is up in North Haverhill. That wasn't done either. My judgment is that what really happened here was that the deal as requested broke down because of the demand for the 10,000 and that the market was strong and Mans was paying and it's to some extent hindsight to now say, well, if we'd know [sic] then we would have called the loan. Nobody knew in October 1987 that the market was going to take a nose-dive. And the conduct of the Fields in not taking easily available steps to find out whether the – after the requested consent broke down to see what Mans, in fact, was doing with De Felice out there is explainable either in terms of their not thinking about –

or not understanding what Mans' options were or simply the fact that they weren't that concerned about triggering the due on sale clause even if [sic] were transferred. I know that it probably appears now that they would have done it. We all think in hindsight. When I think of all those properties I should have bought, when I think of all those classic automobiles that I should have bought back twenty or thirty years ago, and I remember [p. 85] now that I would have done it, but back in 1957 when I could have bought a Chevrolet Impala convertible for $2,700, which is now worth $35,000, and instead bought a DKW which is now worth zero and was within a few years worth zero, what I don't remember is that I didn't have the extra $400 to buy that convertible, but I know from human nature that when I think about it, I forget those facts.

In this case, I think there is a lot [sic] hindsight here as to how serious this appeared to the Fields at the time and whether they would have triggered the due on sale clause. That to me is the only explanation for their failure to take those easily available steps of simply asking either De Felice or Mans, what's the deal here? Who owns this thing? Has there been a transfer, or checking the title in North Haverhill?

Even if I accept Mr. Field's testimony that he wasn't sophisticated in these affairs and that he assumed that Mr. Mans couldn't transfer the property without his consent, I would find that that is not reasonable reliance. A party is not entitled to, you know, be in good faith and just not objectively reasonable. It's not just the subjective test. It's – the case law establishes an objective test, and that is what would be reasonable for a prudent man to do

under those circumstances. At a minimum, a prudent man, I think, would have asked his attorney, could he transfer it without my [p. 86] consent? And the answer would have to be yes, and then the next question would be, well, let's see if he's done it? And those questions simply were not asked, and I don't think on balance that was reasonable reliance.

For all these reason [sic], with regard to these findings I will rule that the plaintiff has failed to establish one of the requisite elements for a nondischargeability under Section 523(a)(2)(A) and that the judgment therefore must be in favor of the defendant. The debt in question is nondischargeable.

I realize from the Fields' standpoint, they have suffered a substantial loss, and it must be a very hard to take that loss when they had the options at various stages looked at with hindsight of taking cash in October of '87. If they had triggered the due on sale clause, made the necessary inquiry and triggered it, and/or taken a hundred and twenty thousand or so in '91 when De Felice was apparently willing to pay a number around that amount, whereas now they end up with nothing, and if this property – if this debt is dischargeable, they in effect have suffered a severe loss. However, in bankruptcy by definition most of the creditors suffer a loss because of breach of contract or various nonperformances by the debtor, and it's only those breaches or debts that are obtained under conditions that make them nondischargeable that survive the bankruptcy and remain an obligation by the debtor. In making that determination, this Court cannot look with [p. 87] hindsight as to what happened after the transaction in question. I have to look

at it as it existed in October of '87, and as I say, in reviewing all these facts, it's my judgment that in October of '87 there was not reasonable reliance on any representations by Mr. Mans once the deal contemplated by those series of letters had fallen through. It is my opinion that the Fields had an obligation at that point to make one of several easily available inquires to ascertain the status of that title and decide whether they wanted to trigger the due on sale clause. So ordered. I thank you for your attention and appropriate judgment will be entered incorporating by reference my findings and conclusions. So ordered.

(Court was then adjourned at 12:44 p.m.)

* * *

EXHIBIT B

BROWNELL & MOESER

A Professional Corporation

Attorneys and Counsellors at Law

[Letterhead Omitted For Printing]

October 9, 1987

Christopher Seufert, Esq.
Five Summer Street
Concord, NH 03301

RE: William Field/Phil Mans

Dear Chris:

As I indicated to you on the telephone, we are proceeding with the development of the Mascoma Lake Property, including the two parcels owned by Mascoma Lake Lodge Enterprises, Inc., the stock of which is wholly owned by Sequoia Security Investment Corp., Phil Mans Corporation. As you know, there is a second mortgage to Mr. & Mrs. Field secured by this property which contains a "due on sale" clause.

Phil has brought in another substantial investor and formed a development partnership called Crescent Beach Development. They will be investing a huge amount of money in the development of the property and thereby further enhance the security for the second mortgage held by Mr. & Mrs. Field.

Obviously we do not want to trigger the "due on sale" clause by reason of the transfer of the property into the development partnership. We ask that Mr. & Mrs. Field,

as the holders of the second Mortgage, consent in writing to the transfer of the property from Mascoma Lake Lodge Enterprises, Inc. to Crescent Beach Development.

We would appreciate your earliest response to this. We could avoid the issue entirely by simply putting the stock of Mascoma Lake Lodge Enterprises, Inc. into the partnership instead of conveying title to the underlying real property, but for a variety of reasons it is preferable to convey the property.

Thank you for your assistance

Sincerely,

BROWNELL & MOESER

By: /s/ Gary
Gary T. Brooks

GTB/ks

EXHIBIT C

Seufert & Thompson, P.C.

Attorneys-at-Law

5 Summer Street

Concord, NH 03301

(603) 224-8672

[Letterhead Omitted In Printing]

October 19, 1987

Gary T. Brooks, Esquire
Brownell & Moeser
P.O. Box 200
Norwich, VT 05055

RE: William Field/Phil Mans

Dear Gary:

The Fields will consent to the proposed transfer upon the following conditions:

1. Payment of $250.00 in lost interest due from the previous closing.

2. Phil Mans to make all future mortgage payments by direct bank transfer.

3. Payment of their attorney's fees of approximately $250.00 to negotiate this matter.

4. One time fee, payable upon transfer, of $10,000.00.

Very truly yours,

/s/ Christopher J. Seufert
Christopher J. Seufert, Esquire

JS:cmd

EXHIBIT D

BROWNELL & MOESER

A Professional Corporation

Attorneys and Counsellors at Law

[Letterhead Omitted For Printing]

October 27, 1987

Christopher J. Seufert, Esq.
Seufert & Thompson, P.C.
5 Summer Street
Concord, NH 03301

RE: William Field/Phil Mans

Dear Chris:

This is in response to your letter of October 19, 1987, with the benefit of consultation with my client who has just returned from several trips.

My client would be willing to make the payments referred to in paragraph 1 and paragraph 3 of your letter, and would be agreeable to having future mortgage payments made by direct bank transfer. However, the fee of $10,000.00 is out of the question.

Sincerely,

BROWNELL & MOESER

By: /s/ Gary
Gary T. Brooks

GTB/ks
cc: Philip W. Mans

EXHIBIT M

PROMISSORY NOTE

U.S. $187,500.00 LEBANON, NEW HAMPSHIRE
JUNE 23, 1987

FOR VALUE RECEIVED, the undersigned promises to pay William D. Field, and Norrine T. Field of Enfield, New Hampshire, or Order, the principal sum of One Hundred Eighty-Seven Thousand Five Hundred Dollars ($187,500.00) with interest on the unpaid principal balance from the date of this Note, until paid, at the rate of Ten Percent per Annum (10%). The principal and interest shall be payable to the Holder by payment to Enfield, New Hampshire, or such other place as the Holders of this Note may designate in writing. The principal and interest shall be payable in one hundred twenty equal monthly installments of Two Thousand Four Hundred Seventy-Seven and 84/100 ($2,477.84) Dollars each of principal, plus accrued interest on the unpaid balance, on the 23rd of the month.

The undersigned shall pay to the Holder hereof a late charge of five percent (5%) of any, installment not received by the Holder hereof within ten (10) days after the installment is due.

If any installment under this Note is not paid when due and remains unpaid for thirty days, the entire principal amount outstanding under this Note and interest thereon shall at once become due and payable at the option of the Holder of this Note; failure to exercise this

option shall not constitute a waiver of the right to exercise this option if the undersigned is in default under this Note.

The principal sum secured by this Note shall also become due and payable at the option of the Holder of this Note on the happening of any default or event by which, under the terms of the mortgage securing this Note, the principal sum may or shall become due and payable, and all covenants, conditions, and agreements contained in the mortgage securing this Note are, by this reference, made a part of this Note.

The undersigned shall not have the right to prepay, in whole or in part, the principal amount outstanding under this Note.

In the event of any default in the payment of this Note, and if suit is brought on this Note, the Holder of this Note shall be entitled to collect in such proceeding all reasonable costs and expenses of suit, including, but not limited to, reasonable attorney's fees. In addition thereto, the Holder shall be entitled to assess and collect upon foreclosure all interest that would have been paid through the full ten (10) year term of this Note.

The undersigned at its sole option, may elect at any time during the term of this Note to substitute a fully paid annuity in exchange for the satisfaction and cancellation of this Note, provided that said annuity unconditionally guarantees payment to the Holder of the same amounts as would otherwise be due under this Note.

Presentment, notice of dishonor, and protect are hereby waived by all makers, sureties, guarantors, and

endorsers of this Note. This Note shall be binding on the maker and his heirs, personal representatives, successors and assigns.

The indebtedness evidenced by this Note is secured by a second mortgage on real property in the Town of Enfield, New Hampshire, subject only to a first mortgage to Mascoma Savings Bank or any subsequent "rollover" of such first mortgage (but only to said bank) in a principal amount never to exceed to a total of $350,000.00.

SEQUOIA SECURITY INVESTMENT CORP.

/s/ Christopher J. Seufert
Witness

By: /s/ Philip W. Mans L.S.
President and
duly authorized

PERSONAL GUARANTY

The undersigned hereby unconditionally guarantees the payment and performance of Sequoia Security Investment Corp. of the foregoing Promissory Note, including without limitation payment over ten (10) years of principal and interest.

/s/ Christopher J. Seufert
Witness

/s/ Philip W. Mans
Philip W. Mans,
individually

EXHIBIT N

SECOND MORTGAGE DEED

With Power of Sale

Mascoma Lake Lodge Enterprises Inc., a/k/a MLL ENTERPRISES, INC. a duly established corporation under the laws of New Hampshire having a principal place of business at Mascoma Lake, Fuller Road, Enfield, County of Grafton, State of New Hampshire, for consideration paid, grants to William D. Field and Norrine T. Field, Mortgagee, as JOINT TENANTS with RIGHTS OF SURVIVORSHIP, whose mailing address is Pembroke Street, Pembroke, County of Murrimack, State of New Hampshire, with MORTGAGE COVENANTS, to secure the payment of One Hundred Eighty-Seven Thousand Five Hundred Dollars ($187,500.00). In accordance with the terms of a note of even or nearly even date herewith and payable to the said Mortgagee, or order, or any renewals or partial renewals thereof, according to the tenor and effect thereof, the following described property:

All and the same land and premises as conveyed to the Mortgagor herein by Warranty Deed of even date from the Mortgagee herein, to be recorded in the Grafton County Registry of Deeds prior to the recording of this Mortgage, and being further described as follows:

Two certain tracts or parcels of land on both sides of Fuller Road in Enfield, County of Grafton and State of New Hampshire, being all and the same lands and premises as conveyed to the Mortgagor herein by Warranty Deed of even

or nearly even dated herewith to be recorded just prior to the recording of this Mortgage.

Being all and the same land and premises as conveyed to William D. Field by Warranty Deed dated June 15, 1971, from Marcel R. Renault and Helen C. Renault and R. Lawlor Cooper and Marcel R. Renault and R. Lawlor Cooper d/b/a Crescent Beach Motor Inn, recorded in the Grafton County Registry of Deeds at Book 1143, Page 256.

This is a Second Mortgage and is subject only to a First Mortgage of even date herewith from the Mortgagor to Mascoma Savings Bank for $350,000.00, such first mortgage to be recorded in the Grafton County Registry of Deeds just prior to the recording of this Second Mortgage. The first mortgage may be rolled over with Mascoma Savings Bank beyond the original ninety (90) day period without violating the terms of this paragraph.

This mortgage is upon the STATUTORY CONDITIONS, for any breach of which the Mortgagee shall have the STATUTORY POWER OF SALE.

Advertising of any foreclosure notice shall be in some newspaper of general circulation of Enfield, New Hampshire. The proceeds of any such sale shall be charged with the expenses thereof, including reasonable attorney's fees.

Mortgagor, in accordance with RSA 477:29 II shall not commit or suffer any strip or waste on the mortgaged premises. If mortgagor wishes to alter the existing buildings on said mortgaged properties he shall first cause an appraisal to be completed which established the value of the mortgaged property. If said appraisal established that

the value of the property less the buildings as exists is less than the combined outstanding balance of principal and interest on the first mortgage, if still existing, and the second mortgage secured by this instrument, then prior to commencement of any alterations mortgagor must provide a performance bond payable to mortgagee for any present outstanding balance of principal and interest on this second mortgage. Such performance bond must continue until the value of the mortgaged property again meets or exceeds the combined outstanding balances on the first and second mortgages.

The Mortgagor covenants and agrees that it will not convey an interest in or title to the premises hereby mortgaged or assign this instrument without prior written consent of the Mortgagee. It is further agreed, as a condition of this mortgage in the event that an interest in or title to this property is transferred or this instrument is assigned without the consent of the mortgagee first obtained in writing, the whole of the unpaid balance of the indebtedness on this mortgage and the promissory note and/or any renewal or renewals thereof and/or any optional readvances and interest thereon, secured hereby, may, at the option of the Holder of this mortgage, become immediately due and payable without further notice. Failure of the Mortgagee to institute collection procedures immediately upon knowledge of a breach of this condition shall not constitute a waiver of the Mortgagee's right to subsequent collection action.

IN WITNESS WHEREOF, I hereunto set my hand and seal this 6th day of July 1987.

MASCOMA LAKE LODGE ENTERPRISES INC.
(a/k/a MLL ENTERPRISES, INC.)

/s/ Gary T. Brooks
Witness

By: /s/ Philip W. Mans L.S.
President and duly authorized

STATE OF NEW HAMPSHIRE
GRAFTON COUNTY, SS.

At Lebanon this 6th day of June, 1987. Philip W. Mans personally appeared and he acknowledged this instrument, by him sealed and subscribed to be his free act and deed and the free act and deed of Mascoma Lake Lodge Enterprises Inc. (a/k/a MLL ENTERPRISES, INC.)

Before me:

/s/ Nancy A. Conrad
Notary Public/Justice of Peace
My Commission expires 9-25-96
(Seal)

Received and recorded: July 8, 1987 12:30 P.M.

/s/ Carol A. Elliott, Register